In Defence of Green Civil Disobedience

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Desperate times call for desperate measures. We are in the midst of an 'unprecedented environmental crisis' and are facing a 'climate emergency'. In 2017, the World Scientists' Warning to Humanity (signed by over 15,000 scientists from 184 countries) urged the global community to take immediate action against 'potentially catastrophic climate change due to rising [greenhouse gases] from burning *fossil fuels* … *deforestation* … and *agricultural production*'. And according to the 2018 IPCC Report on Global Warming of 1,5°C, unprecedented systems transitions are necessary within a decade in order to limit global warming to 1.5°C. Despite science being clear and alarming, states have so far seemed unable or unwilling to undertake the ambitious efforts necessary to effectively combat climate change, notably drastic reductions in greenhouse gas emissions in line with the 2015 Paris agreement (whose central aim is to limit global temperature rise to well below 2°C, and ideally 1.5°C, above pre-industrial levels). This overall state inaction, or grossly insufficient state action, on climate change and its corporate drivers (particularly the fossil fuel and animal industries) further exacerbates the desperation of our times, and has prompted climate activists to resort to more drastic measures, such as the time-honoured tradition of civil disobedience (i.e. 'the deliberate violation of law for a vital social purpose'). Throughout history, failure of the state to address and redress pressing social problems has given rise to political acts of civil disobedience, and while activists typically claim that their illegal actions are justified either legally or morally in that they are necessary to protect a higher good, such necessity defences have so far been 'notoriously unsuccessful' before courts.

Recent judicial developments suggest that this may be about to change, and that the 'green' necessity defence is gaining traction. In 2020, two Swiss courts made international headlines for acquitting climate activists on the grounds of a 'climate necessity' (similar proceedings are further underway in France, e.g. Tribunal Correctionnel de Lyon). These climate judgments are novel and both highly celebrated and controversial, and it is worth putting them into conversation with an equally pioneering German precedent from 2018, which accepted a necessity defence for animal activists. Read together, a common theme crystallizes: unlawful protest can be a legitimate response to a persistent pattern of state inaction, and courts are now beginning to compensate for this legislative or executive failure by stepping in in defence of green civil disobedience.

Switzerland: Climate Necessity

In 2020, a trial court in Lausanne and an appellate court in Geneva recognized climate change as an immediate danger capable of creating a (putative) state of necessity (Art. 17 Criminal Code). Both cases concerned unlawful actions protesting

the fossil fuel investments of *Crédit Suisse* (the Swiss bank with the worst CO2 record).

The Lausanne Case

Twelve climate activists were charged with trespassing after staging a symbolic game of tennis in a *Crédit Suisse* branch. In its judgment of 13 January 2020, the trial court acquitted the defendants and held that their actions were justified by a state of necessity. The court affirmed that, given the indubitable scientific evidence, climate change poses an imminent danger to the health and life of the young activists, and held that in order to avert the foreseeable climate catastrophe and limit global warming to the IPCC recommended 1,5°C threshold, *immediate* action must be taken now. By contrast, due to the insufficient measures taken by the government, the court noted that Switzerland is currently not on track to reach its Paris agreement goals, which was further corroborated by Swiss climate scientists (deploring, inter alia, a 'gap between the commitments made in the Paris agreement and the capacity and willingness of decision-makers to actually implement them'). The crucial issue at hand was the subsidiarity of means, that is, whether violating the law was necessary because no other, legal options were available. The court considered four hypothetical alternatives, all of which it deemed futile in the present case:

1. *lawful demonstrations* on public ground: would have likely not been authorized, and would certainly not have attracted the kind of media attention necessary to create public pressure;
2. *formal communication* with the bank: this path had been exhausted by both the activists and other NGOs, but to no avail (the bank had never even responded to such inquiries);
3. *political means*: the court held that the ordinary political process (which has so far proven slow and ineffective in this regard) does not afford a suitable other means in the face of the climate emergency ('le temps politique … n'est plus compatible avec l'urgence climatique avérée');
4. *judicial means*: even though a legal framework for fighting climate change exists, it is at present not sufficiently respected or enforced, and furthermore not enforceable by the activists.

The court concluded that there were no legal alternatives available to the climate activists and that their actions were therefore justified. However, this judgment was later (22 September 2020) reversed on appeal. The appellate court denied the existence of a state of necessity, and notably held that the defendants' illicit actions were in breach of the principle of subsidiarity. This judgment has been appealed to the Swiss Federal Supreme Court (the last instance court).

The Geneva Case

Similar proceedings took place in Geneva. In this case, the defendant was a climate activist who participated in a demonstration during which red (bloody) handprints were left on a Crédit Suisse branch's façade. The activist was charged with damaging property and, on 20 February 2020, convicted by the trial court, which

denied the existence of a state of necessity. In its judgment of 14 October 2020, the appellate court reversed this decision and acquitted the activist in recognition of a (putative) state of necessity. While confirming, along with prevailing case law and legal opinion, that a state of necessity can only be invoked as regards the protection of individual (rather than collective) goods, the appellate court clarified that the climate emergency poses a danger to some of the most precious individual goods, notably life and bodily integrity (this assessment is in line with the general recognition of climate change and other environmental harm as a serious threat to human rights, e.g. by the UN Human Rights Committee, the UN Special Rapporteur on Human Rights and the Environment, and the ECtHR). The appellate court further confirmed that the dangers posed by climate change are acute and concrete, and underscored that the gravity of the situation is exacerbated by the government's lagging and insufficient measures. In particular, the court noted that the government's climate policy seems to favour voluntary measures and thus essentially relies on corporate social responsibility, whereas in the meantime, *Crédit Suisse* had actually increased its fossil fuel investments and refused to respond to activists' correspondences and petitions. The court concluded that, at least from the point of view of the activist, there were thus no options other than civil disobedience, in order to pressure the bank into voluntary fossil fuel divestment. That is, even if legal alternatives would have hypothetically been available, the defendant was in good faith convinced that there weren't, and thus at any rate acted in an erroneously assumed, putative state of necessity.

Ultimately, the Swiss Federal Supreme Court will have to decide on the novel question of climate necessity. While in the past, the Federal Supreme Court has declined to accept the necessity defence for environmental activists (holding that in a democratic legal system, political and ideological concerns must primarily be pursued through ordinary political and legal channels), it remains to be seen whether the highest court will adapt its jurisprudence to the new reality of climate emergency.

Germany: Animal-Protective Necessity

Not only is industrial animal production one of the main drivers of climate change, it is also the locus of widespread animal suffering. Undercover investigations by animal activists regularly reveal the horrific conditions prevailing even in ordinary factory farms and slaughterhouses, and document systematic violations of animal welfare laws. The German authorities' persistent failure to enforce animal welfare regulation in the agricultural sector was recently highlighted by the district court of Ulm, which observed a 'manifest and dramatic enforcement deficit' and noted that the state is not even rudimentarily willing or able to ensure effective prosecution of animal welfare crimes. The state's inaction vis-à-vis the animal industry has essentially cultivated and perpetuated a situation of institutionalized lawlessness in factory farming – what has been described as a 'licence for factory farming beyond the law' or as 'organized agro-crime'.

This is the backdrop against which the pioneering 2018 judgment of the regional high court Naumburg was set. In this case, three animal rights activists had illegally entered a pig breeding facility in order to produce video footage of animal welfare

violations, and were subsequently charged with trespassing. The court (confirming the lower courts' judgments) acquitted the activist and held that their actions were justified on the grounds of necessity (§ 34 Criminal Code). It first clarified that animal welfare is a firmly entrenched (public) legal good whose endangerment is capable of creating a state of necessity. The court further held that the massive violations of animal welfare norms perpetrated by the facility in question constituted a present and enduring danger, and that this danger could not have been averted by any other means. Even though it is generally the task of public authorities to investigate crimes and obtain evidence, in this case, engaging the authorities would have been futile, because the activists knew from prior experience that the competent authorities would not follow up on reports unless they were corroborated by video footage. Moreover, the relevant authorities in this case already had prior knowledge of the animal welfare violations in said facility, but neglected to act. The court therefore concluded that due to the state's failure, the activists' actions were necessary and justified in order to protect animal welfare.

'Judicial Activism' as a Necessary Reaction to State Inaction

In essence, Swiss and German courts have stepped in in defence of green civil disobedience, and in doing so, advanced pioneering judgments that may herald a transformative process of 'greening' the necessity defence. Prima facie, this might appear to be green 'judicial activism', and an obvious concern is that such precedents hand down a judicial seal of approval for activists to take justice into their own hands. Certainly, such are drastic steps for a court to take, to legitimize unlawful protest. However, these rulings must be contextualized, and viewed against the backdrop of the state's inaction, or grossly insufficient action, to adequately address and alleviate the pressing problems of climate change ('one of the biggest challenges of our times') and the 'ongoing moral catastrophe' of institutionalized animal abuse ('one of the great injustices of our time'). The necessity-generative consequences of the state's failure to discharge its climate- and animal-related protective duties figured prominently throughout the courts' reasoning. For example, the German court rightly rejected the notion that its ruling would undermine the state's enforcement monopoly and make way for private vigilantism, by pointing out that the necessity defence could only succeed *because* the public authorities refused to exercise their power (and duty) of enforcement (meaning that the state cannot have its cake and eat it too, i.e. assert its enforcement monopoly vis-à-vis private citizens while simultaneously refusing to act on its enforcement monopoly vis-à-vis the animal industry). Ironically, it is thus persistent state inaction (and the ensuing regulatory or enforcement vacuum) that creates a state of necessity in the first place, and that essentially necessitates and legitimizes civic action in the form of civil disobedience.

These judgments are thus not so much judicial activism, but rather a necessary and appropriate judicial reaction to, and indictment of, state and corporate irresponsibility. These judges should be commended for their courage to break with legal tradition, their willingness to translate abstract green creeds into concrete green deeds and

to take responsibility when other branches of government and corporate actors fail to do so. This kind of judicial courage is precisely what is desperately needed at the present time, for 'if there was ever an issue that demands … courage in action, it is climate change'. It can only be hoped that others will follow suit, because times are not only desperate – *time is running out*. What we need is not just desperate acts of civil disobedience and isolated acts of judicial courage, but across-the-board civil courage and responsibility by 'everyone, everywhere'. In the words of the UN Special Rapporteur on human rights and the environment: 'The world has many grassroots climate heroes, but needs more political and corporate leaders to rise to the challenge.' If not we, who? And if not now, when?

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